In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1021

STEPHEN F. SCHONBRUN, PETITIONER

v.

COMMANDING OFFICER, ARMED FORCES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (Pet. App. 46–49) are unreported. The opinion of the court of appeals (Pet. App. 37–45) is reported at 403 F.2d 371.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1968. The petition for a writ of certiorari was filed on February 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

335-644—69

QUESTION PRESENTED

Whether the courts below properly declined to overturn the refusal of the Army to grant a member of the ready reserves an exemption from active duty on the basis of personal and community hardship.

STATUTES AND REGULATIONS INVOLVED

10 U.S.C. 271; 10 U.S.C. 673; 32 C.F.R. 125.3; 32 C.F.R. 126.3; Army Regulation 601–25 are set forth in the Appendix, *infra*, pp. 7–12.

STATEMENT

Petitioner enlisted in the Army reserves on July 28, 1963, for six years. Less than one month before his unit was activated in May 1968, he sought an exemption from active duty pursuant to an Army regulation which authorizes such exemption because of "extreme" personal or community hardship. His claim of "extreme personal hardship" was that his wife was suffering from a psychiatric disorder and that her well-being required his presence in the household (Pet. App. 60–62). The claim for "extreme community hardship" was based on the fact that he was teaching a class of ten severely disturbed children in an underprivileged area (Pet. App. 50–52). He was given a 30-day extension while his application was under consideration. Upon learning that his commanding officer had denied his request, petitioner appealed and submitted additional evidence (Pet. App. 71–78). On June 19, 1968, he was notified that the appeals board had denied him an exemption on the ground that he "did not meet the criteria for exemption from in-

voluntary call to active duty as established in AR 601–25" (Pet. App. 40, 87).

When an application for reconsideration (Pet. App. 79–83) was denied (Pet. App. 84), petitioner filed suit for *habeas corpus* in the district court. After two hearings, the district court denied the writ. It accepted petitioner's representations, but concluded that the weighing of the hardship to the community and to his wife as against the needs of the armed forces "is peculiarly the kind of decision that must be made by the military" (Pet. App. 47).

The court of appeals unanimously affirmed.[1] It stated that the "very purpose of a 'ready reserve' is that the reserve should be ready" (Pet. App. 43); that "[a]lthough Schonbrun's case is appealing * * * the courts must have regard to the flood of unmeritorious applications that might be loosed by such interference with the military's exercise of discretion and the effect of the delays caused by these in the efficient administration of personnel who have voluntarily become part of the armed forces" (Pet. App. 44); and that "this is a subject on which civil review of discretionary action by the military should be declined" (*ibid.*).[2]

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[1] Although the court expressed some doubt as to whether *habeas corpus* would be available to a reservist challenging an order requiring him to report for active duty as opposed to seeking a discharge, it recognized that the district court "was free to treat the petition as one for mandamus under 28 U.S.C. 1361" (Pet. App. 42) and therefore reached the merits.

[2] On December 23, 1968, Mr. Justice Harlan denied petitioner's application for a stay of the court of appeals' mandate, and on January 13, 1969, the full Court (Mr. Justice Douglas dissenting) denied reconsideration. The Army has advised that petitioner entered on active duty on March 4, 1969.

ARGUMENT

Petitioner voluntarily enlisted in the ready reserve and does not challenge the activation of his unit. He claims only that the Army should have exempted him from the call to active duty because of alleged extreme community and personal hardship. As both courts correctly held, however, that is a determination that peculiarly calls for and thus lies within the expert judgment of the military authorities, since it requires balancing the asserted community and personal hardships which would result from the individual reservist's entry on active duty against the needs of the armed forces—an evaluation that must consider, among other things, the reservist's place in the integrated functioning of his unit.

This case is thus different from *Hammond* v. *Lenfest*, 398 F. 2d 705 (C.A. 2), and *United States ex rel. Mankiewicz* v. *Ray*, 399 F. 2d 900 (C.A. 2), upon which petitioner relies (Pet. 9–15). Those cases involved reservists who sought to be discharged on the ground they were conscientious objectors and did not present the problem of balancing the needs of the military against claimed hardship to an individual reservist and the community. As the court of appeals explained the distinction (Pet. App. 43–44):

> In contrast to the yea or nay character of entitlement to the conscientious objection exemption, administration of the hardship exemption necessarily involves a balancing of the individual's claims against the nation's needs, and the balance may differ from time to time and from place to place in a manner beyond the competence of a court to decide.

The court of appeals correctly recognized that the proper utilization of men who have voluntarily joined the military forces requires that this balancing be left to the sound discretion of the military. Cf. *Orloff* v. *Willoughby*, 345 U.S. 83, 92–95.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1969.

[3] Although petitioner contends (Pet. 16–24, 25–27) that the Army committed various procedural errors in denying petitioner's claim for exemption from active duty, the short answer is that the court of appeals found (Pet. 45) that the alleged errors had not prejudiced him, and he makes no showing here of any actual prejudice.

APPENDIX

10 U.S.C. 271. Ready Reserve: continuous screening.

Under regulations to be prescribed by the President, each armed force shall provide a system of continuous screening of units and members of the Ready Reserve to insure that—

* * * * *

(5) members whose mobilization in an emergency would result in an extreme personal or community hardship are not retained in the Ready Reserve.

10 U.S.C. 673. Ready Reserve.

(a) In time of national emergency declared by the President after January 1, 1953, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons concerned, order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve under the jurisdiction of that Secretary to active duty (other than for training) for not more than 24 consecutive months.

(b) To achieve fair treatment as between members in the Ready Reserve who are being considered for recall to duty without their consent, consideration shall be given to—

(1) the length and nature of previous service, to assure such sharing of exposure to hazards as the national security and military requirements will reasonably allow;

(2) family responsibilities; and

(3) employment necessary to maintain the national health, safety, or interest.

The Secretary of Defense shall prescribe such policies and procedures as he considers necessary to carry out this subsection. He shall report on those policies and procedures at least once a year to the Committees on Armed Services of the Senate and the House of Representatives.

* * * * *

32 C.F.R.:

§ 125.3 Regulations for screening the Ready Reserve.

Screening of the Ready Reserve shall be conducted in accordance with the provisions of Section 271, Title 10, United States Code.

* * * * *

(b) *Extreme hardship.* Members of the Ready Reserve whose call to active duty in an emergency would result in extreme personal or community hardship as defined by the Secretary of Defense shall, upon request, be transferred to the Standby Reserve. Reservists shall be informed of the following definitions of hardship:

(1) *Extreme personal hardship.* An individual desiring transfer from the Ready Reserve to the Standby Reserve must establish by documentary evidence that his dependents would, by his call to active duty in an emergency, suffer extreme hardship greater than that which dependents of other Reservists can be expected to experience from the Reservist's order to active duty. In order to insure a uniform standard, the criteria established by the Service should conform generally with current Selective Service regulations on extreme hardship deferment. In those cases where the reservist is registered with Selective Service, documentary evidence may include a recommendation by the State Director of Selective

Service of the State in which the registrant's Local Board is located. Requests for consideration under this paragraph must be initiated by the Reservist or by his dependents.

(2) ***Extreme community hardship.*** An individual desiring transfer from the Ready Reserve to the Standby Reserve must establish by documentary evidence that his withdrawal from the community in a national emergency would have a substantially adverse effect on the health, safety or welfare of the community. In those cases where the reservist is registered with Selective Service, documentary evidence may include a recommendation by the State Director of Selective Service, of the State in which the registrant's Local Board is located. Requests for consideration under this paragraph must be initiated by the Reservist.

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PART 126—READY RESERVISTS INVOLUNTARILY ORDERED TO ACTIVE DUTY: DELAY, EXEMPTION, AND EARLY RELEASE

§ 126.3 Policy.

(a) ***Screening.*** The screening of Ready Reservists will cease when they have been alerted for involuntary order to active duty. Ready Reservists who have been alerted for involuntary order to active duty will continue to be screened in accordance with Part 125 of this Subchapter B.

(b) ***Delay or exemption.*** (1) Ready Reservists who have been alerted for involuntary order to active duty may request delay or exemption if they are—

* * * * *

(iii) Ready Reservists whose involuntary order to active duty would result in an extreme personal or community hardship; or

* * * * *

(3) Request for delay or exemption from a member of the reserve forces involuntarily ordered to active duty will be considered on the merits of the individual case and the requirements of the services concerned. Such requests will be submitted through the military chain of command prescribed by the military departments. Final decision in all cases of appeal is vested in the Secretaries of the military departments concerned or their designated representatives.

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Army Regulation 601-25:

3-2. Delay and exemption policies.

* * * b * * * (3) * * * Delay or exemption of all Ready reservists, other than those described in (1) and (2) above, is authorized in accordance with either of the following criteria:

(a) In exceptional cases when the involuntary order to active duty will result in an extreme personal or community hardship (para 1-12);

* * * * *

"1-12. Criteria for hardship conditions.

a. Extreme personal hardship.

(1) Illness of a member of immediate family. When, in the opinion of the attending physician, the illness of the member is such that—

(a) Fatality appears to be imminent; or,

(b) Presence of the reservist is an important factor in the recovery of the patient and his immediate departure would have a serious effect upon the patient.

b. Extreme community hardship. In general, this requirement will be met only when all of the following conditions are determined to exist:

(1) The service performed by the reservist is essential to the maintenance of health, safety, or welfare of his community.

(2) The service cannot be performed by other persons residing in the area concerned.

(3) The reservist cannot be replaced in the community by another person who can perform such services."

3–11. Action on requests for delay or exemptions.

a. Requests will be considered only upon written application submitted by the member concerned. Requests which do not contain the complete information, documentary evidence, and other required data will be returned to the individual with specific indication of the additional information desired."

* * * * *

(c) Requests for delay or exemption submitted on the basis of extreme personal or community hardship—

(1) May be considered when the extreme personal or community hardship condition occurs not more than 6 months prior to receipt of alert or active duty orders.

(2) May not be considered when such hardship condition existed at the time applicant submitted DA Form 1140–1 (Army Reserve Status Verification Questionnaire) as prescribed in AR 140–25, whichever is the more recent, and applicant failed to request transfer from the Ready Reserve by reason of hardship."

3–14. Action by area commanders and CO, USAAC, and CO, USARCPC. The commander having responsibility for the administration of delay and exemption procedures over USAR members under their jurisdictional control will take the actions outlined below on requests for delay or exemption submitted by such members.

a. Notify the reservist of the decision rendered on request for delay or exemption.

b. When the request is denied, notify the member of such denial and reason therefor, together with his right to appeal such decision."

3–15. Appeals.

a. General. Appeals for reconsideration of denial of requested delay or exemption may be considered when the member can furnish additional evidence which may warrant further review of his original request. When the basis of the appeal is for reasons other than furnished in the original request, such requests will be processed as an initial request for delay or exemption.